Filed Oct. 27, 1904.

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 58.

L. J. BRYAN, As Marshal, for the Use of Chesapeake, Petitioner,

vs.

LOUIS BERNHEIMER.

SUPPLEMENTAL BRIEF FOR RESPONDENT.

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(17,411.)

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 58.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

L. J. BRYAN, AS MARSHAL FOR THE USE, &C.,

vs.

LOUIS BERNHEIMER.

Supplemental Brief of R. E. Steiner and Gordon Macdonald, for Louis Bernheimer.

Subsequent to the filing of the record in this court, the main question involved was decided by the Supreme Court of the United States.

Appellant sought, by summary proceedings, to try the title to certain goods in the district court, sitting in bankruptcy, and the presiding judge held that the district court, sitting in bankruptcy, had the jurisdiction to decide between

an adverse holder and the marshal, acting as temporary receiver (or trustee), the right between these parties, and this, too, without the filing of a plenary bill, but simply by summary motion to adverse holder to appear and show cause, if any he had, why he should not be decreed to be the fraudulent recipient of said goods.

The following cases, decided at the last term of this court, fully and finally decides the proposition against this jurisdiction, and to this extent affirms the decree of the circuit court of appeals. (See Bardes *vs.* Hawarden Bank, 178 U. S., 524; Mitchell *vs.* McClure, 178 U. S., 539, and Hicks *vs.* Knost, 178 U. S., 541.)

It cannot be contended that defendant (Bernheimer) consented to the district court taking jurisdiction. He stoutly resented the assertion of this right, and only came in to protest and to show the court that it had no right to force him into the forum of the bankrupt court to test the questions involved, and immediately appealed from the district court's ruling when it decreed that he (Bernheimer) had no interest in the property. The three cases cited above decide that the district court, sitting in bankruptcy, has no jurisdiction "over suits brought by trustees in bankruptcy to recover or collect debts due from third parties or to set aside transfers of property to third parties, alleged to be fraudulent as against creditors, including payments in money or property to preferred creditors."

It must necessarily follow that the district court, which had no jurisdiction over a suit commenced by a plenary bill, could most certainly not secure to itself this jurisdiction by summary proceedings. The opinion of Mr. Justice Gray, in Bardes *vs.* Hawarden Bank, *supra*, affirms the doctrine

laid down in Smith *vs.* Mason, 14 Wall., 419; Marshall *vs.* Knox, 16 Wall., 551–557; Eyster *vs.* Goff, 91 U. S., 521–525, on the question of trying the right to property by summary proceeding.

It follows, therefore, that the opinion of the circuit court of appeals should be affirmed on this proposition, and that therefore Bernheimer should be allowed counsel fees, costs, etc., for this most unjust proceeding, covering as it does nearly two years in point of time and the various courts of the United States.

Respectfully submitted.

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